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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1347~~ 122

CUSTER CHANNEL WING CORPORATION

and

WILLARD R. CUSTER, *Petitioners,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioners, Custer Channel Wing Corporation and Willard R. Custer, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on April 3, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals issued April 3, 1967 is unreported as yet and is printed in Appendix A, *infra,* pp. 1a-14a. The opinion and order of the District Court for the District of Maryland entered November 12, 1965 is reported at 247 F. Supp. 481 and is printed in Appendix B, *infra,* pp. 15a-53a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1967 (Appendix A, *infra*, p. 15a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether a person is required at his peril to determine the scope of a penal statute reasonably open to opposing interpretation.

2. Whether a person can be held in criminal contempt for wilfully violating the restraining order of the Court when the order does not clearly delineate whether the defendants' conduct was permitted or restrained.

3. Whether there was an abuse of discretion, in a non-jury case, in sentencing petitioner for criminal contempt to 183 days imprisonment for violating an injunctive order of the District Court restraining him from sale of stock except private sale when the facts in this case make it one of original interpretation by a court.

STATUTORY PROVISIONS INVOLVED

Section 4(1) of the Securities Act of 1933, 15 U.S.C. Section 77d(1) (1958), as amended, 15 U.S.C. 77d(2) (1964):

> 77d. Exempted transactions.
>
> The provisions of Section 77e of the title shall not apply to .....
>
> • • •
>
> (2) transactions by an issuer not involving any public offering
>
> • • •

STATEMENT OF THE CASE

Petitioners were convicted of criminal contempt for violating an injunction issued by the District Court. The corporate petitioner was fined $5,000 plus one-half of the costs and the individual petitioner was sentenced to serve 183 days in prison and to pay one-half of the costs.

On May 25, 1962, the District Court permanently enjoined petitioners from engaging in acts or practices that would constitute a violaiton of the registration requirements of Section 5 of the Securities Act of 1933, 15 U.S.C., Sect. 77e(a) and 77e(c) (1958). Exempted from the registration requirement, and hence from the injunction, are certain types of transactions listed under Section 4(1) of the Securities Act of 1933, 15 U.S.C., Sect. 77d(1) (1958), as amended, 15 U.S.C. 77d(2) (1964), among them "transactions by an issuer not involving any public offering."

After the issuance of the order of the District Court on May 25, 1962, petitioners sold stock to a limited number of persons who, before making the purchase, signed an investment letter acknowledging that he knew that the stock was not registered; that the sale was initiated by his application to the corporation; that he had become informed to the extent he desired; that he knew the corporation was enjoined from certain sales of stock; that he was allowed unlimited access to all the corporation's records; that he had all the information he required for his purchase; and that he agreed not to resell the stock for a period of 13 months (see Appendix B, *infra*, p. 18a, footnote 2) From May 25, 1962 to the date of the opinion of the District Court on November 12, 1965, no transferee had requested permission of the corporation to sell the stock. The corporation's transfer agent was directed not to transfer any of this stock on the books of the corporation and each certificate issued contained a recitation on the face

that transfer of it was restricted (see Appellants' Appendix p. 51).

After a lengthy non-jury trial, the District Court concluded that within the meaning of the statute the sales of stock by petitioners were not private sales but sales involving a public offering. As the opinion of the District Court reflects, the controlling issues resolved were issues of law, that is, of statutory construction, and these legal issues were ones of first impression.

The Court of Appeals affirmed the judgment of the District Court on April 3, 1967.

REASONS FOR GRANTING THE WRIT

1. The decisions of the Courts below are probably in conflict with applicable decisions of this Court.

This Court has previously held that a citizen should not be required to construe penal provisions of law at his peril in *Connally* v. *General Const. Co.*, 269 U.S. 385 (1925), in adopting, with approval, the following language in *United States* v. *Capital Traction Co.*, 34 App. D.C. 592, 19 Ann. Cas. 68, this Court stated:

> ". . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

The District Court found, and the Court of Appeals affirmed, that the petitioners were guilty of selling un-

registered stock in a manner involving a public offering contrary to Section 5 of the Securities Act. The statute does not define a public offering or a private offering and no attempt has been made to judicially formalize it. Hence, to this day, what is a private or a public offering is open to interpretation.

The Securities and Exchange Commission has listed indices of a "Non-Public Offering Exemption" in its Release No. 4552 of November 6, 1962 (see Appellee's Appendix R9-R-15) based upon its interpretation of the decisions of the courts including the decision of this Court in the case of *SEC* v. *Ralston Purina Co.*, 346 U.S. 119 (1953). Petitioners in the present case substantially complied with all of the requirements for a "non-public offering", namely, (1) limited number of transferees, (2) investment letter, i.e. purchasing for investment rather than resale, (3) restriction of transfer and (4) notice of restriction placed on the certificates.

This Court in the Ralston Purina case, *supra,* pointed out that the registration requirement of the statute was designed to protect the unsophisticated investor who was not able to fend for himself. Petitioners' sales in this case were to experienced and sophisticated investors.

2. The facts in this case present a question of first impression in the interpretation of what constitutes a transaction "by an issuer not involving any public offering" under Section 4(1) of the Securities Act of 1933, 15 U.S.C. Sect. 77d(1) (1958), as amended, 15 U.S.C. Sect. 77d(2) (1964), and raises a significant problem in corporate financing—whether and to what extent a small business corporation must go to the expense of first registering its securities with the Securities and Exchange Commission before selling them to a limited number of persons for investment. Without this Court interpreting the scope of private offering, the small business corpora-

tion will continually make corporate decisions and unintentional blunders as to sale of a limited volume of its securities at its peril unless it first goes to the expense of filing a registration statement with the SEC. Delay in approval can cause needless economic hardship to these corporations.

3. The sentence of the individual petitioner of imprisonment for 183 days is probably in conflict with the decision of this Court in *Cheff* v. *Schnackenberg,* 384 U.S. 373, in which it was stated:

> "Therefore, in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof. Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries."

It is readily observable that 183 days exceed this six months maximum.

Moreover, the imposition of sentence of 183 days in prison is so excessive under the facts of this case as to constitute an abuse of discretion, particularly since, as reflected by the opinions of the courts below, there was no finding of fraud, misappropriation of funds, dissatisfaction of any purchaser or other element connoting evil purpose, overreaching or other unfairness.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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